IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202101557/A3
[2024] EWCA Crim 310

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 8 February 2024

Before:
THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(LORD JUSTICE HOLROYDE)

MR JUSTICE BRYAN

THE RECORDER OF LEEDS
(HIS HONOUR JUDGE KEARL KC)
(Sitting as a Judge of the CACD)

REX

v

"ABQ"

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR W ALEESON appeared on behalf of the Appellant.
MS J ELEY appeared on behalf of the Crown.

J U D G M E N T
(Approved)

1. THE VICE-PRESIDENT: This appellant pleaded guilty to grave sexual offences against her own children. She was sentenced to an extended sentence of 30 years, comprising a custodial term of 22 years and an extended licence period of 8 years. She now appeals against her sentence by limited leave of the single judge.
2. The victims of her offences are entitled to the life-long protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes, no matter may be included in any publication if it is likely to lead members of the public to identify either of them as a victim of the offences. We shall refer to them simply as "C1" and "C2". Given that the appellant is their mother, her name must be anonymised, and we direct that in any report of these proceedings, she must be referred to only by the randomly chosen letters "ABQ". The name of her male co-accused must also be anonymised, and we direct that in any report he should be referred to only as "D2".
3. The offences were committed over a period of 11 months, between February 2019 and January 2020. C1 was aged 8 to 9, C2 was aged 5 to 6. They lived with their mother the appellant, then aged in her late 20s, and her late husband, a man much older than the appellant who has subsequently died. The appellant was in a sexual relationship with D2, who lived nearby with his wife and children.
4. The appellant and D2 jointly engaged in repeated sexual abuse of the appellant's daughters, summarised by the judge as including the joint enterprise rape of C1, the sexual assault of C1 by digital penetration and by the insertion of objects, the sexual assault of C2 by penetrating her vagina with a sex toy and the taking of still and moving images of the sexual offences against both girls.

5. On 27 August 2020, the appellant and D2 made their first appearance before the Crown Court at Ipswich. The appellant pleaded guilty to 14 offences. D2 pleaded guilty to 10 offences.

6. Avoiding distressing details as far as possible, we summarise the offences which the appellant admitted as follows.

   Counts 2 and 4: she and D2 both pleaded guilty to three offences of rape of a child under 13. Those charges reflected the oral and anal rapes of C1, carried out by D2 and photographed by the appellant, who on one occasion had taken C1 out of school for the specific purpose of being raped.

   Counts 3, which D2 also admitted, and 14 to 17: three sexual assaults on C1, and one on C2, involving the penetration of the child's vagina or anus with fingers or with a sex toy. Filming by the appellant of those offences showed that the children were in pain and distress.

   Counts 18 and 19: offences of sexual assault, one on each child, involving the sexual touching of their genitalia. Again, the offences were filmed. In one recording, C1 can be heard complaining of the pain she was suffering. The appellant replied: "It'll hurt for a couple of days, just trust me". The appellant then became angry with C1 and told C1 that she was "really pissing her off by not cooperating". In another recording, showing the appellant repeatedly opening C2's vagina and stroking her clitoris, the appellant commented that her daughter's vagina looked red. She said there was nothing she could do about it, "It will hurt, honey". In a remark plainly showing the appellant's appreciation of the pain she was causing, the appellant then said, "I'm not going to stretch her anymore, she's too young. She's too sore."

   Count 20: an offence of causing or inciting a child under 13, namely C1 to engage in

sexual activity, by causing C1, in the presence of C2, to penetrate the appellant's anus with a sex toy and to lick the appellant's vagina.

Counts 11 to 13: three offences of taking indecent photographs of children, comprising 150 still and 188 moving images in category A, 280 still and 58 moving images in category B, and one still image in category C.

7. The appellant put forward a basis of plea, to the effect that she had committed the offences as a result of threats and blackmail by D2. This was not accepted by the prosecution. In early April 2021, the judge, HH Judge Overbury, conducted a Newton hearing, at which he heard evidence from the appellant, and considered the text messages which had been exchanged between her and D2. The judge rejected as untrue the appellant's evidence that she had been blackmailed or threatened as she alleged. He did however accept that the text messages involved "a deal of emotional manipulation" of the appellant by D2, who was clearly aware that the appellant would do anything to please him and used that fact to put some pressure on her to obtain what he desired.
8. The judge was satisfied that the appellant's infatuation and obsession with D2 caused her, to some extent, to ignore her maternal responsibilities, whilst D2 obviously saw the appellant and her daughters as an easy and ideal sexual source of fulfilling his perverted sexual fantasies. The judge concluded that both were equally responsible for what happened.
9. At the sentencing hearing on 27 April 2021, the judge considered a pre-sentence report and psychiatric and psychological reports relating to the appellant, including as to her level of intelligence, but noted that having heard her give evidence, he was able to form his own judgement as to her character and abilities. He reiterated his finding that the appellant, although subject to emotional manipulation by D2, could have rejected that and

protected her children from D2, but had chosen not to. He found that the text messages showed a significant degree of planning by the appellant and D2. He found that the appellant had derived some sexual satisfaction by causing her daughter to perform sexual acts on her, and that she had persisted in her offending even though her daughters complained of pain. He carefully and, in our view correctly, categorised the various offences under the relevant sentencing guidelines.

10. The judge found both the appellant and D2 to be dangerous offenders, as that termed is defined for sentencing purposes. He said that each of them had shown a callous disregard for children: in D2's case, to fulfil his perverted sexual interest in young girls; and in the appellant's case, because of her desperate attempts to entice D2 away from his family.

11. The judge imposed the same total sentence on each of the offenders. The appellant received a 30-year extended sentence, comprising a custodial term of 22 years and an extended licence period of 8 years on count 1. On each of the other counts, with the exception of counts 12 and 13, for which there was no separate penalty, she received concurrent extended sentences with the same extended licence period and the following custodial terms: counts 2 and 4, 13 years; counts 3 and 14 to 17, 12 years; count 11, 5 years; counts 18 and 19, 12 years 6 months and count 20, 8 years.

12. We should note at once that the judge fell into error in sentencing on count 11. The maximum sentence for an offence contrary to section 1(1)(a) of the Protection of Children Act 1978 is 10 years' custody. The extended sentence of 13 years (5 years' custody plus 8 years extended licence) exceeded that maximum.

13. The judge in his sentencing remarks referred to "the appropriate credit" for the appellant's guilty pleas, but did not specifically state what reduction he made on that basis. It appears however that he may have given the maximum credit of one-third, as he

did to D2.

14. The appeal proceedings have had a protracted procedural history. It is unnecessary to go into the details. With the leave of the single judge, the appellant submits that her total sentence was manifestly excessive, in particular because the judge took too high a starting point and failed to give appropriate weight to the appellant's mental health problems and psychiatric and psychological vulnerabilities.
15. The appellant renews her application for leave to appeal on the ground that the judge should not have found her dangerous, a ground on which the single judge refused leave.
16. In written submissions, the appellant wished to advance a new ground of appeal relating to the expert evidence of Dr Ho, which was considered by the court below. However, in the light of issues which have arisen in other, unconnected cases, the respondent does not seek to rely on that evidence. We need not say more about it.
17. The appellant further applies to adduce as fresh evidence, pursuant to section 23 of the Criminal Appeal Act 1968, the evidence of two consultant forensic psychiatrists, both approved under section 12 of the Mental Health Act 1983, and to argue a new ground of appeal, that the appellant should have been made subject to a Hospital Order, pursuant to section 37 of the Mental Health Act 1983, rather than a custodial sentence. The proposed fresh evidence comprises reports dated 20 April 2023 and 25 August 2023, by Dr Alcock, instructed on behalf of the appellant, whose earlier report was considered by the judge; reports dated 27 October 2020 and 12 July 2023 by Dr Went, instructed by the respondent; and a joint statement by the two witnesses, dated 26 September 2023.
18. For convenience, we shall hereafter refer to provisions of the Mental Health Act 1983 simply by the relevant section numbers.
19. The joint statement indicates that the expert witnesses are agreed on the following points.

The appellant has mild to moderate disorder of intellectual development (learning disability) and is on the autism spectrum. She also suffers from depression. Her disorders made her vulnerable to exploitation by D2. The disorders are associated with her offending behaviour. Prediction of future risk is difficult given that she has no previous convictions. However, without adequate long-term supervision she would be vulnerable to further offending and risk of offending if set at large. Her treatment, future risk management and rehabilitation would most effectively be done in a hospital setting, and appropriate treatment for her sexual offending, having regard to her mental disorders, would not be available within the female prison estate. The usual criminal justice pathway would not be robust or specialist enough to manage her risk on release; however, her risk could be adequately managed under section 37 and treatment would be available to her in hospital.

20. Although the expert witnesses in their earlier reports had opined that a restriction order, under section 41, was not necessary or appropriate, their agreed statement now indicates an agreement that, on balance, that would be the most safest and most robust management of her risk.

21. The written opinions of the witnesses have been developed in oral evidence. We are grateful to both doctors for their assistance.

22. On the appellant's behalf, Mr Aleeson does not criticise the manner in which the judge structured the sentencing or the judge's categorisation of individual offences. He submits however that the judge erred in applying the principle of totality, and reached a total sentence which is manifestly excessive in length. On the basis that full credit was given, Mr Aleeson points out that the total custodial term, before reduction for guilty pleas, must have been 33 years. That, he submits, was much too long, bearing in mind that the

appellant had no previous convictions and suffered from intellectual and emotional disabilities. He points to the evidence before the judge that the appellant's full scale IQ is 63, placing her in the bottom 1 per cent of the population and making her particularly vulnerable to exploitation by others.

23. Mr Aleeson acknowledges the seriousness of the offending and the aggravating features of the gross breach of trust, the young ages of the two victims and the lengthy period of offending. He draws attention however to the statement by this Court, at paragraph 24 of R v AYO & Ors [2022] EWCA Crim 1271; [2022] 4 WLR 95, that case law show that it will be comparatively rarely that the total custodial term of an extended sentence for multiple sexual offences will exceed about 30 years after a trial. Bad though this case is, Mr Aleeson submits, it did not merit a total term of 33 years' custody after a trial.

24. Mr Aleeson goes on to submit that the judge was wrong to make the finding of dangerousness. He submits that the offences were committed against the appellant's children, that she will never be permitted to have custody of those children again, that there was nothing to suggest a risk to children other than her own, and that accordingly the statutory criterion of a significant risk of serious harm to others was not met.

25. Relying on the proposed fresh evidence, Mr Aleeson further submits that the most appropriate disposal is a hospital order under section 37, with a restriction order under section 41. He points out that neither of the psychiatrists supports the imposition of a hybrid sentence under section 45A.

26. For the respondent, Ms Eley acknowledges the agreed views of the two psychiatrists and accepts that there is agreed evidence pointing to a reduced level of culpability which could lead to at least some reduction in sentence. She makes no affirmative submissions on the issues of dangerousness and the appropriate disposal, on the basis that those must

be matters for the court.

27. Reflecting on these submissions, we see force in Mr Aleeson's first ground of appeal. These were grave offences, repeated over a period of nearly a year, against two young and vulnerable victims who have suffered life-long psychological harm. They were committed in gross breach of trust by their own mother, in their own home. However, the judge did not have the benefit of the guidance given some months later by this court in R v AYO as to the correct approach to sentencing offenders convicted of sexual offences so serious that nothing less than long custodial sentences can be justified. We have already referred to what was said by the court in that case at paragraph 24. At paragraph 22, the court emphasised that however grave the crimes, section 231(2) of the Sentencing Act 2020 requires any custodial sentence to be for the shortest term that, in the opinion of the court, is commensurate with the seriousness of the offending.

28. With that guidance in mind, we accept the submission that, notwithstanding the number and gravity of the offences, this case fell somewhat short of meriting a custodial term of 30 years or more. In our view, the appropriate total custodial term, after a trial, for an adult offender, who did not have the appellant's mental health problems, would be 27 years.

29. The Sentencing Council's Guideline on sentencing offenders with mental disorder, developmental disorders or neurological impairments makes clear, in paragraphs 9 to 15, the approach to be taken when considering whether an offender's culpability was reduced by reason of a mental impairment or disorder. We are bound to say, with all respect to the judge, that it does not appear from the sentencing remarks that he made any reduction in sentence on this ground. In our view, some reduction was and is necessary. The expert evidence establishes that the appellant, because of her mental disorders, was

particularly susceptible to being taken advantage of by others; and the judge accepted that the appellant was emotionally manipulated by D2, with whom she was infatuated. She was, as we have said, of previous good character. There is nothing in the evidence to suggest that she had displayed any sexual interest in children before she came under the influence of D2, though as we have noted the judge did find that she had derived some sexual satisfaction from the acts which she caused her daughters to perform upon her. In all the circumstances, it is, in our view, established that the appellant's culpability was reduced to some extent by her mental disorders.

30. We are not however persuaded that any very substantial reduction in sentence is appropriate. It is accepted that the appellant knew that her actions were seriously wrong. It is clear, even from the brief references we have made to the details of the offences, that she knew she was causing physical pain and great distress to her children, but carried on regardless. The judge was entitled to find that the appellant could have refused to do what D2 wished, and could have protected her children, but chose not to. Nothing in the proposed fresh evidence leads to any different conclusion in that regard. In our view, therefore, sentencing has to be approached on the basis that the appellant, despite her limitations, chose to comply with D2's wishes when she could have refused to do so. Moreover, whilst we accept the expert evidence that the appellant would be less able than most people to think through and understand the long-term consequences for her victims, we are not persuaded that there was any material reduction in her understanding that, by her own direct acts, she was causing pain, distress and misery to her young daughters.

31. In all the circumstances of this case, we take the view that the sentence which would otherwise have been appropriate after trial should be reduced by 5 years to 22 years.

32. The appellant was entitled to a reduction in that custodial term to reflect her guilty pleas.

We cannot however accept that she was entitled to the maximum reduction of one-third, which is permitted by the Sentencing Council's guideline on Reduction in sentence for a guilty plea. Paragraph F2 of that guideline states that where an offender's version of events is rejected at a Newton hearing, the reduction which would have been available at the stage of proceedings the plea was indicated should normally be halved, and it may be appropriate further to decrease the reduction if witnesses are called during the hearing.

33. We can see no reason why the normal consequences of an unsuccessful Newton hearing should not follow in this case. The Newton hearing did not require any other witnesses to be called, but the appellant herself gave evidence which the judge rejected as untrue. The matters on which she was disbelieved were not peripheral: she tried, but failed, to put herself forward as a victim of crime, blackmail and threats at the hands of D2, when, on the judge's findings, she willingly complied with his wishes.

34. As we have said, the sentencing remarks do not make entirely clear what reduction was made. But if the judge did allow full credit of one-third, he would, with respect, have been wrong to do so. In the circumstances we have summarised, the appellant could not properly expect to receive more than about 15 per cent credit. In our view, the appropriate custodial term, after taking into account the guilty pleas, was 19 years.

35. We next consider the issue of dangerousness. As everyone recognises, it is for the court rather than the expert witnesses to decide whether the statutory criteria for such a finding were met. We have no doubt that they were. As the judge found, the appellant has shown herself willing, when infatuated with a lover, to commit grave offences against defenceless children, causing them enduring psychological harm. It is asserted on her behalf that she was, and is, particularly vulnerable to manipulation by an unscrupulous man. True it is that there is no realistic prospect of her having the care of her own

children in the future; but we do not accept that there is no significant risk of her coming under the influence of another sexually deviant man and causing serious harm to someone else's children. Indeed, the expert witnesses' evidence as to the appropriate disposal involved observations about the future risk which took them very close to accepting that the statutory criteria for a finding of dangerousness would be met. The judge accordingly was entitled to make the finding of dangerousness and there is nothing in the proposed fresh evidence to undermine his decision.

36. We turn now to consider the appropriate disposal in the light of the proposed fresh evidence. Important guidance in this regard was given by the decision in this Court of R v Vowles [2015] EWCA Crim 45; [2015] 1 WLR 5131. At paragraph 51, Lord Thomas CJ said:

> "It is important to emphasise that the judge must carefully consider all the evidence in each case and not, as some of the early cases have suggested, feel circumscribed by the psychiatric opinions. A judge must therefore consider, where the conditions in s.37 (2) (a) are met, what is the appropriate disposal. In considering that wider question the matters to which a judge will invariably have to have regard to include (1) the extent to which the offender needs treatment for the mental disorder from which the offender suffers, (2) the extent to which the offending is attributable to the mental disorder, (3) the extent to which punishment is required and (4) the protection of the public including the regime for deciding release and the regime after release. There must always be sound reasons for departing from the usual course of imposing a penal sentence and the judge must set these out."

37. At paragraph 54, Lord Thomas went on to say that where there is expert evidence suggesting that offending was wholly or in significant part attributable to a mental disorder for which treatment is available, and a hospital order with or without a restriction order may be appropriate, the sentencer should consider matters in the following order:

> "i) As the terms of s.45A(1) of the MHA require, before a hospital order is made under s.37/41, whether or not with a restriction order, a judge should consider whether the mental disorder can appropriately be dealt with by a hospital and limitation direction under s.45A.
>
> ii) If it can, then the judge should make such a direction under s.45A(1). This consideration will not apply to a person under the age of 21 at the time of conviction...
>
> iii) If such a direction is not appropriate the court must then consider, before going further, whether, if the medical evidence satisfies the condition in s.37(2)(a) (that the mental disorder is such that it would be appropriate for the offender to be detained in a hospital and treatment is available), the conditions set out in s.37(2)(b) would make that the most suitable method of disposal. It is essential that a judge gives detailed consideration to all the factors encompassed within s.37(2)(b)...
>
> iv) We have set out the general circumstances to which a court should have regard but, as the language of s.37 (2)(b) makes clear, the court must also have regard to the question of whether other methods of dealing with him are available. This includes consideration of whether the powers under s.47 for transfer to prison for treatment would, taking into account all the other circumstances, be appropriate."

38. Following that guidance in the circumstances of the present case, and making every allowance for the appellant's mental health issues which to some degree reduced her culpability, we have no doubt that severe punishment is required. In circumstances where the appellant played an active role in assisting the rapes of her own daughters, and herself committed grave sexual assaults upon them, we can see no "sound reasons for departing from the usual course of imposing a penal sentence".

39. That consideration weighs heavily in our assessment of whether the proposed fresh evidence makes it appropriate to depart from the manner in which the judge dealt with the offences. A section 37 order, even if combined with a section 41 order, may be in the

best interests of the appellant, for the reasons which the two expert witnesses have explained, and may provide sufficient protection for the public, but it contains no punitive element.

40. We have reflected on the expert opinions as to the desirability of long-term treatment in hospital and as to the comparative inadequacy of the treatment of the appellant's mental disorders which would be practicable within the prison estate or under a prison sentence with a section 45A order. We have considered whether the appellant's mental disorder can appropriately be dealt with by a custodial sentence combined with a hospital direction and a limitation direction under section 45A. However, in the light of the evidence we have heard as to the nature and duration treatment which the expert witnesses feel is appropriate, it does not seem to us that a hybrid sentence of that kind is appropriate. Indeed, we were told at a late stage of this hearing that it is unlikely that the appellant would be assessed as suitable for transfer to hospital pursuant to such an order. Such orders are generally most appropriate for those suffering from a different type of acute condition which is amenable to immediate treatment.

41. Nor are we persuaded that a section 37/section 41 order will better protect the public than an extended sentence with a substantial custodial term and an extended licence period during which the appellant will be supervised. Bearing in mind the agencies which would be involved and the existence of the Sexual Harm Prevention Order ordered by the judge, it seems to us that the risk of the appellant again coming under malign influence, and thus endangering children, can as well be monitored under an extended sentence as under a section 37/41 order. True it is that the nature of the response to such a risk would differ as between the two regimes, and that it will be possible for the appellant to remain subject to conditional discharge under a section 37/section 41 order for longer than the

total term of an extended sentence. But the potential advantages which might flow from that do not, in our view, amount in the circumstances of this case to sound reasons for avoiding the punitive element of sentencing which we think is necessary.

42. We are therefore unable to accept the submission that a hospital order, with or without a restriction order, should be substituted for the sentences imposed by the judge. It follows that the proposed fresh evidence, whilst otherwise meeting the criteria in section 23 of the 1968 Act, is not capable of affording a ground of appeal. Grateful as we are to Dr Alcock and Dr Went for their assistance, we decline formally to receive their evidence as fresh evidence. We also refuse the renewed application for leave to appeal against the finding of dangerousness and the new application for leave to vary the grounds of appeal.

43. For the reasons we have given, we allow the appeal to the following extent only. We quash the sentences imposed below on counts 1, 2, 3, 4, 11, 14, 15, 16 and 17. We substitute the following concurrent sentences. On count 1, an extended sentence of 27 years comprising 19 years' custody and 8 years extended licence. On each of counts 2 and 4, an extended sentence of 26 years, comprising a custodial term of 18 years and 8 years extended licence. On counts 3, 14, 15, 16 and 17, an extended sentence of 25 years, comprising a custodial term of 17 years and an extended licence period of 8 years. On count 11, an extended sentence of 10 years, comprising a custodial term of 2 years and an extended licence period of 8 years. The sentences on counts 12, 13, 18, 19 and 20 remain as imposed in the court below. All the ancillary orders in the court below also remain in force. Finally, we direct that the Crown Court record be amended to show the amount of the surcharge as being £170.

44. THE VICE-PRESIDENT: Are you able to hear me?

45. THE APPELLANT: I can.

46. THE VICE-PRESIDENT: Thank you. That will have been very difficult for you to take in, we understand, but let me just spell out to the effect of it as far as you are concerned. The type of sentence which you are serving remains the same but your total custodial term has been reduced from 22 years to 19 years. You will have to serve at least two-thirds of the 19 years though all the time you have been in custody so far counts towards that. You will then be released, at some point between then and the end of the 19-year period. When you are released, you will be on licence for the remainder of the 27-year period including the 8 years of the extended licence. Again, it is difficult for you to take all that in but no doubt others will be able to explain it to you in greater detail.
47. Mr Aleeson, Ms Eley, thank you both and our thanks again to the doctors. We are very grateful for their assistance.

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk